A

Styletech Sdn Bhd v Kaolin (M) Sdn Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NC-238–06 OF 2015
ABU BAKAR JAIS JC
12 JANUARY 2016

C *Civil Procedure — Judgment — Consent judgment — Plaintiff filed originating summons to set aside consent judgment — Whether plaintiff mandated to initiate and file originating summons — Whether previous suit involved plaintiff — Whether court competent to set aside consent judgment recorded by another court — Whether consent judgment contravened ss 16(5) and 132C of the Companies Act 1965*

D

In the present case, the second defendant was the majority shareholder and director of the plaintiff whereas the first defendant was a mining company which had granted the second defendant the right to occupy certain portion of land after obtaining a mining lease over the land. The second defendant built a building structure and a makeshift pottery factory on the said land. As dispute arose, the first defendant sued the second defendant ('the previous suit') and prayed that the second defendant to vacate the land and to remove the structure and factory. The previous suit ended when the first defendant and the second defendant entered into a consent judgment on the suit. The broad terms of the consent judgment were that, the second defendant had to vacate the land and remove all building structure on the land. Being dissatisfied with the consent judgment, the plaintiff filed the present originating summons ('the OS') to challenge the validity of the consent judgment. It was contended by the plaintiff that the consent judgment was in contravention of ss 16(5) and 132C of the Companies Act 1965 ('the Act'). The issues for determination were: (a) whether the plaintiff was mandated to initiate and file the OS; (b) whether the previous suit involved the plaintiff; (c) whether this court was competent to set aside the consent judgment recorded by another court; (d) what should have been done by the plaintiff; (e) whether the consent judgment was in contravention of ss 16(5) and 132C of the Act.

E

F

G

H

Held, dismissing the OS with costs against the plaintiff:

I

(1) The plaintiff could not litigate the OS as it had not been shown that the plaintiff had obtained a board approval to initiate the same. Hence the OS filed and initiated could not be allowed on this simple ground. The purported board resolution produced by the plaintiff had no connection to the subject matter of the present OS (see paras 35 & 39).

(2) Even in substance the plaintiff should not be granted any relief in the OS as truly the plaintiff was not involved either in name or in effect of the consent judgment. The previous suit proceeded and culminated by the recording of the consent judgment on the basis that both the building structure and factory belong to the second defendant alone and not the plaintiff. Thus the plaintiff had no concrete or valid reason to set aside the consent judgment late in the day after the recording of the same by parties unrelated to the plaintiff in the true sense of the terms of the consent judgment (see paras 42–43).

(3) The court was not at liberty to set aside and declare the consent judgment to be a nullity when another court of concurrent jurisdiction had found it fit that such terms as agreed by the first defendant and the second defendant in the previous suit could be incorporated and agreed in the form of the consent judgment recorded. Further, the consent judgment did not contravene the provisions of the Act as submitted by the plaintiff in the present OS. The previous suit culminating in the recording of the consent judgment did not at all involve the plaintiff both in name and substance (see paras 45 & 47).

(4) The plaintiff should have challenge the consent judgment and have it set aside by initiating direct proceedings in the previous suit itself in the court that recorded the consent judgment. Another court of concurrent jurisdiction as this court now for the OS did not have the jurisdiction to disturb the consent judgment already recorded by another court. The collateral proceeding separated from the previous suit itself was not allowed (see paras 48–49).

(5) The court was of the view that the previous suit related to the building structure and factory of the second defendant alone and not the plaintiff. Therefore the plaintiff's submission that the consent judgment was in contravention of s 16(5) of the Act was actually had no connection at all with either the previous suit or the consent judgment. The said statutory provision could not been infringed as the terms or contents of the consent judgment were not related to the properties of the plaintiff (see para 51).

(6) The consent judgment could only be in contravention of s 132C of the Act if the building structure and factory were considered to be the properties of the plaintiff. As these properties were not the properties of the plaintiff, there could never be an issue of disposal of the properties of the company in contravention of the said provision of the Act. Further, the consent judgment did not make reference to a disposal but only to the removal of the properties. In the present case, there was no disposal of the properties as there was no transfer or change in beneficial ownership or alienation in respect of the building structure and factory to another party (see paras 52–54).

[Bahasa Malaysia summary

Dalam kes ini, defendan kedua merupakan pemegang saham majoriti dan pengarah plaintif manakala defendan pertama adalah syarikat perlombongan yang telah memberikan defendan kedua hak untuk mendiami atas sebahagian tertentu tanah selepas memperoleh pajakan perlombongan ke atas tanah itu. Defendan kedua telah membina struktur bangunan dan kilang pasu sementara atas tanah tersebut. Oleh kerana terdapat pertikaian, defendan pertama telah menyaman defendan kedua ('guaman terdahulu') dan memohon agar defendan kedua mengosongkan tanah itu dan mengalihkan struktur dan kilang itu. Guaman terdahulu berakhir apabila defendan pertama dan defendan kedua memasuki penghakiman persetujuan berhubung guaman itu. Terma luas penghakiman persetujuan itu adalah bahawa, defendan kedua perlu mengosongkan tanah itu dan mengalihkan struktur bangunan atas tanah itu. Berasa tidak puas hati dengan penghakiman persetujuan itu, plaintif telah memfailkan saman pemula ('SP tersebut') untuk mencabar kesahan penghakiman persetujuan itu. Ia dihujahkan oleh plaintif bahawa penghakiman persetujuan itu melanggar ss 16(5) dan 132C Akta Syarikat 1965 ('Akta tersebut'). Isu-isu untuk ditentukan adalah: (a) sama ada plaintif dimandatkan untuk memulakan dan memfailkan SP tersebut; (b) sama ada guaman terdahulu melibatkan plaintif; (c) sama ada mahkamah ini kompeten untuk mengetepikan penghakiman persetujuan yang direkodkan oleh mahkamah lain; (d) apa yang patut dilakukan oleh plaintif; (e) sama ada penghakiman persetujuan itu melanggar ss 16(5) dan 132C Akta tersebut.

Diputuskan, menolak SP tersebut dengan kos terhadap plaintif:

(1) Plaintif tidak boleh melitigasi SP tersebut kerana ia tidak ditunjukkan bahawa plaintif telah memperoleh kelulusan lembaga untuk memulakan yang sama. Justeru SP tersebut yang difailkan dan dimulakan tidak boleh dibenarkan atas alasan mudah ini. Resolusi lembaga yang dimaksudkan itu yang dikemukakan oleh plaintif tiada kaitan dengan hal perkara SP tersebut (lihat perenggan 35 & 39).

(2) Walaupun secara *substance* plaintif tidak patut diberikan apa-apa relief dalam SP tersebut kerana sebenarnya plaintif tidak terlibat sama ada dalam nama atau pelaksanaan penghakiman persetujuan itu. Prosiding guaman terdahulu diteruskan dan diputuskan dengan merekodkan penghakiman persetujuan itu berasaskan bahawa kedua-dua struktur bangunan dan kilang itu adalah milik defendan kedua seorang dan bukan plaintif. Oleh itu plaintif tiada sebab kukuh atau sah untuk mengetepikan penghakiman persetujuan itu begitu lewat selepas direkodkan yang sama oleh pihak-pihak yang tiada kaitan dengan plaintif dalam maksud sebenar terma penghakiman persetujuan itu (lihat perenggan 42–43).

(3) Mahkamah tiada kebebasan untuk mengetepikan dan mengisytiharkan penghakiman persetujuan menjadi terbatal apabila mahkamah lain yang mempunyai bidang kuasa serentak mendapati ia sesuai dengan terma tersebut sepertimana dipersetujui oleh defendan pertama dan defendan kedua dalam guaman terdahulu boleh dimasukkan dan dipersetujui dalam bentuk penghakiman persetujuan yang direkodkan. Selanjutnya, penghakiman persetujuan tidak melanggar peruntukan Akta tersebut sepertimana dihujahkan oleh plaintif dalam SP tersebut. Guaman terdahulu yang diputuskan dalam rakaman penghakiman persetujuan tidak langsung melibatkan plaintif dalam nama dan *substance* (lihat perenggan 45 & 47).

(4) Plaintif sepatutnya mencabar penghakiman persetujuan itu dan mengetepikannya dengan memulakan prosiding secara langsung dalam guaman terdahulu itu sendiri di mahkamah yang merekodkan penghakiman persetujuan itu. Mahkamah lain yang mempunyai bidang kuasa serentak seperti mahkamah ini untuk SP tersebut tidak mempunyai bidang kuasa untuk mengganggu penghakiman persetujuan yang telahpun direkodkan oleh mahkamah lain. Prosiding kolateral yang berasingan daripada guaman terdahulu itu sendiri tidak dibenarkan (lihat perenggan 48–49).

(5) Mahkamah berpendapat bahawa guaman terdahulu adalah berkaitan struktur bangunan dan kilang defendan kedua itu seorang dan bukan plaintif. Oleh itu hujah plaintif bahawa penghakiman persetujuan itu melanggar s 16(5) Akta tersebut sebenarnya tiada kaitan langsung sama ada dengan guaman terdahulu atau penghakiman persetujuan. Peruntukan statutori tersebut tidak boleh dilanggar kerana terma atau kandungan penghakiman persetujuan itu tiada kaitan dengan hartanah plaintif (lihat perenggan 51).

(6) Penghakiman persetujuan itu hanya boleh melanggar s 132C Akta tersebut jika struktur bangunan dan kilang itu dianggap sebagai hartanah plaintif. Oleh kerana hartanah tersebut bukan hartanah plaintif, tidak mungkin wujud isu tentang jualan hartanah syarikat yang melanggar peruntukan Akta tersebut. Selanjutnya, penghakiman persetujuan tidak membuat rujukan tentang suatu jualan tetapi hanya kepada pengalihan hartanah itu. Dalam kes ini, tiada jualan hartanah itu kerana tiada pemindahan atau pertukaran pemilikan benefisiari atau pengambilalihan berhubung struktur bangunan dan kilang kepada pihak lain (lihat perenggan 52–54).]

Notes

For cases on consent judgment, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 4871–4888.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (folld)

CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779; [2014] 9 CLJ 1012, FC (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd [1990] 3 MLJ 239; [1990] 3 CLJ Rep 165, HC (refd)

William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555; [1991] 1 CLJ Rep 492, SC (refd)

Legislation referred to

Companies Act 1965 ss 16, 16(5), 132, 132C, 132C(4)
Rules of Court 2012

Mohamaed Hisyam Abdullah (Fuad Abi & Aidil) for the plaintiff.
Sanjeev Kumar (Sanjeev Kumar) for first defendant.

Abu Bakar Jais JC:

INTRODUCTION

[1] In this case the originating summons ('OS') of the plaintiff for the determination of this court is as follows:

(a) a declaration that the consent judgment dated 24 September 2014 ('the consent judgment') in Kuala Lumpur Suit No 22NCVC-651–11 of 2013 ('the previous suit') is illegal and void for being ultra vires s 16 and/or s 132C of the Companies Act 1965 ('the Act'); and

(b) an order to set aside the said illegal and void consent judgment.

MATERIAL FACTS

[2] Apparent from the introduction above is the challenge mounted by the plaintiff against the recording of the consent judgment. That is the crux of the dispute between the parties in the present case. However it should be noted the word 'parties' here does not really in the true sense of the word include the second defendant. This is because although the second defendant is no doubt cited by the plaintiff as a party, the former chose not to file any affidavits in opposition to the OS. Since the second defendant chose not to file affidavits in reply, the same is essentially not contesting the plaintiff's OS. This is despite the fact that the second defendant was actually the defendant in the previous suit which resulted in the recording of the consent judgment. And who was the

plaintiff in the previous suit? The plaintiff in the previous suit was the first defendant in the current OS. So for the previous suit, the plaintiff was the first defendant now, while the defendant then was the second defendant now. The plaintiff now for the present OS was not at all involved or a party in the previous suit for the recording of the consent judgment.

[3] A further elaboration on the parties for the previous suit is narrated as follows.

[4] Who was the second defendant now for the previous suit? She was the majority shareholder and director of the plaintiff now for the current OS. Who was the first defendant now for the previous suit? The first defendant then was a mining company who had granted the second defendant now the right to occupy certain portion of land after obtaining a mining lease over the land. Thereafter the second defendant built a building structure and a makeshift pottery factory on that very portion of the land. As dispute arose thereafter between the two, first defendant as the plaintiff in the previous suit sued the second defendant and among others prayed that the second defendant vacates the land and removes the structure and factory. The previous suit ended when the first defendant as plaintiff in the previous suit recorded the consent judgment with the second defendant who was the defendant in the previous suit. This is the consent judgment being challenged by the plaintiff in the current OS.

[5] The consent judgment essentially is on the following broad terms:

(a) the second defendant is to vacate the land;

(b) the second defendant to remove all building structure on the land;

(c) the first defendant to pay ex-gratia payment of RM60,000 to second defendant;

(d) the first defendant to remove all building structure on a certain date in the event the second defendant failed to remove the same;

(e) the first defendant shall not be required to pay the RM60,000 in the event the same is to remove all the building structure; and

(f) first defendant shall not be liable for any damages in the event it has to remove all the building structure.

[6] As explained, in the present OS that consent judgment is challenged by the plaintiff on alleged contravention of two statutory provisions. First it is said that the consent judgment infringes s 16 of the Act which states:

Registration and incorporation

(1) Persons desiring the incorporation of a company shall lodge the memorandum and the articles, if any, of the proposed company with the Registrar together with the other documents required to be lodged by or under this Act, and the Registrar on payment of the appropriate fees shall subject to this Act register the company by registering the memorandum and articles, if any.

Statutory declarations

(2) The person named in the articles as the first secretary of the company shall lodge with the Registrar a declaration in the prescribed form stating that all or any of the requirements of this Act have been complied with and containing such information as may be prescribed, and the Registrar may accept such a declaration as sufficient evidence of compliance.

Subscriber to lodge statutory declaration

(3A) Every promoter of a proposed company who is a natural person shall before the incorporation of the company make and lodge with the Registrar and the Official Receiver a statutory declaration in the form prescribed by regulations that he will not be acting in contravention of sections 125 and 130.

Certificate of incorporation

(4) On the registration of the memorandum the Registrar shall certify under his hand and seal that the company is on and from the date specified in the certificate incorporated, and that the company is –

(a) a company limited by shares;

(b) a company limited by guarantee;

(c) a company limited both by shares and guarantee; or

(d) an unlimited company, as the case may be, and where applicable, that it is a private company

Effect of incorporation

(5) On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

Members of company

(6) The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

(7) The Registrar shall not register a memorandum and articles, if any, of a proposed company unless the memorandum or articles contain the names of at least two persons who are to be the first directors of the proposed company

(8) Notwithstanding anything to the contrary in this Act or any rule of law, the Registrar shall refuse to register the memorandum of a proposed company if he is satisfied that –

(a) the proposed company is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or

(b) it would be prejudicial to national security or public interest for the proposed company to be registered.

[7] Second it is submitted that the consent judgment too is in contravention of s 132C of the Act which states:

(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for –

(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange –

(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.

(1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if –

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

(c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.

(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or thirty thousand ringgit or both.

(6) In this section, 'director' includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called.

[8] The plaintiff in respect of s 16 of the Act as narrated above chose to be unclear in the OS by citing the whole provisions of that section. What the plaintiff sought to do actually is to challenge the consent judgment by arguing the same is in contravention specifically of s 16(5) of the Act. Thus the provision that is relevant to be taken into account is this particular subsection of s 16 of the Act and not the other subsections of the same.

THE PLAINTIFF'S ARGUMENTS

[9] The plaintiff in summary contended as the consent judgment is in contravention of the two statutory provisions, it cannot be disputed that the same is illegal, void, ultra vires, cannot legally stand and should be set aside.

[10] The plaintiff also argued that the matter is rightly before the court now as the plaintiff had legitimately appointed the plaintiff's counsel or solicitor to challenge the consent judgment. The plaintiff acted within its power to initiate the action in challenging the same.

[11] The plaintiff further argued that as the judgment is tainted with illegality, it can be set aside by way of a collateral proceeding.

[12] The plaintiff also argued that the objection by the first defendant on the intitulement of the action is too trivial in nature as it refers merely on the issue upon which word should be used namely 'perintah' ('order') or 'penghakiman' ('judgment'). The error on the use of the word if any is merely technical in

nature and in any event both parties are fully aware of the relevant consent judgment being impugned. The error if any does not contravene any provisions in the Rules of Court 2012.

[13] It is wrong for the first defendant to argue that the OS is an abuse of process as the plaintiff is privy and fully aware of the recording of the consent judgment merely because the second defendant is the majority shareholder and director of the plaintiff.

[14] The first defendant according to the plaintiff failed to appreciate the established principle that a company is by law distinct and separate from its shareholders. The plaintiff as the company, has the legal right and capacity to take action vide the OS despite what is done and agreed by the second defendant as a majority shareholder in recording the consent judgment. More so when the plaintiff is not wholly owned by the second defendant. There is no privity in the recording of the consent judgment as the plaintiff was not a party at all in the previous suit.

[15] The plaintiff also submitted it was wrong for the first defendant to also argue there is an abuse of process because the plaintiff did not at all claim relief against the second defendant. As the consent judgment is contended by the plaintiff to be illegal, there is no reason to seek relief against the second defendant personally. Thus the plaintiff says it is sufficient to name the second defendant as a nominal defendant only. Further it is the contention of the plaintiff it cannot be forced to seek reliefs against a party it does not wish to.

[16] The plaintiff further submitted as s 16(5) of the Act provides for the plaintiff as the company to sue and be sued, it was wrong for the first defendant to sue the second defendant then as the factory is not owned by the second defendant but by the plaintiff. There is documentary evidence to show that the first defendant is aware that the same does not belong to the second defendant but the plaintiff. It follows that the first defendant should have sued the plaintiff in the previous suit instead of suing the second defendant personally. Therefore the consent judgment is basically in contravention of s 16(5) of the Act.

[17] In respect of s 132C of the Act, the plaintiff argued that only the shareholders in a general meeting can dispose the property of the company. Since there was no such meeting held, the second defendant is not at liberty to agree to the consent judgment affecting the building or factory. The consent judgment according to the plaintiff involved a disposal of the property of the company in the factory in contravention of the said provision of the Act.

[18] The plaintiff also contended there is no issue of estoppel by reason of privity in the previous suit only between the first defendant and second defendant as the consent judgment contravened the provisions in the Act. That privity if any cannot allow for the consent judgment to stand as it infringes the statutory provisions.

THE FIRST DEFENDANT'S ARGUMENTS

[19] The first defendant submitted in gist among others that the plaintiff as a company needs a board resolution to pursue the current OS. The plaintiff cannot continue the action as there is no such resolution. There is no resolution also to appoint any authorised solicitors to represent the plaintiff for the OS.

[20] In the previous suit the second defendant admitted the oral agreement to occupy the land was between the first defendant and second defendant only and did not indicate the involvement of the plaintiff. The pottery making factory was also constructed by the second defendant alone and not by the plaintiff. The second defendant did not plead in the previous suit that the factory is the property of the plaintiff. The second defendant also entered the consent judgment in her personal capacity as the owner of the building structure and factory and not in her capacity as shareholder and director of the plaintiff.

[21] As such it was never the case of the second defendant in the previous suit that the first defendant had sued the wrong party by not suing the plaintiff. Even if it is true that the first defendant had sued the wrong party, it is the second defendant who should have raised this defence in the previous suit.

[22] On the same note, the first defendant argued that a misjoinder of the parties does not ipso facto make the previous suit null and void.

[23] The first defendant further argued that this court does not have jurisdiction to set aside the consent judgment which is valid and perfected by another court of concurrent jurisdiction.

[24] It is also the contention of the first defendant that even if the consent judgment is null and void, the plaintiff should intervene in the previous suit and seek the relief as requested now at the court that issued the consent judgment. The plaintiff is not at liberty to file the current OS challenging the consent judgment as the only party that is allowed to challenge the same on limited grounds such as fraud or lack of jurisdiction in a fresh proceeding before another court is the second defendant.

[25] The first defendant also argued that the fresh action filed in the form of the current OS by the plaintiff amounts to a collateral attack on a valid judgment by another court of concurrent jurisdiction.

[26] The first defendant also argued that it was wrong for the plaintiff to submit that the consent judgment contravened s 132C of the Act as there must be a disposal of the company's property as stated in that provision. This is not the case as it stands because there is no issue of disposal of property in the consent judgment. The same merely provides that the factory be removed by the second defendant or the first defendant in the event the former failed to do so.

[27] The above provision of s 132C of the Act also does not apply because of the exception which is provided by s 132C(4) of the Act that states the section does not apply if the court orders the disposal of the properties.

[28] It is also argued by the first defendant that s 132C of the Act is an indoor management provision governing the company and its shareholders and directors only and the same does not apply to third parties such as the first defendant who has no nexus with the plaintiff. The consent judgment cannot be a nullity as the statutory provision concerns the conduct between the members of the company itself and no others. The plaintiff according to the first defendant at best could only take action against the second defendant alone in the event there is a breached of the provision and not to challenge the consent judgment altogether.

[29] The first defendant also submitted the factory and the building structure were never the proprietary rights of the plaintiff. There is no evidence to the effect that this is proven by the plaintiff.

[30] The first defendant also contended that the consent judgment is binding on the plaintiff as the second defendant is the majority shareholder of the plaintiff. The second defendant is the alter ego of the plaintiff.

[31] As the plaintiff is privy with the second defendant, the plaintiff is estopped by the doctrine of res judicata from impeaching the consent judgment.

[32] There is also serious prejudice to the first defendant if the consent judgment is declared a nullity as the first defendant had been deprived of the enjoyment of the land until the recording of the consent judgment. The same should be given its effect as parties had agreed to the terms of the same.

A FINDINGS OF COURT

[33] Although there are several issues raised by both parties as explained in this OS, I am of the opinion there are only a few issues that call for determination as these issues are the core issues affecting the outcome of the OS. Further the decisions on these limited issues as narrated below would in any event be sufficient to dispose the OS either in favour of the plaintiff or the first defendant.

Whether the plaintiff is mandated to initiate and file the OS

[34] Of crucial importance the first issue ought to be the standing of the plaintiff in pursuing the OS. This is because the whole OS could be defeated if it can be proven that the plaintiff as a company did not have the prerequisite authority to file the OS in the first place for it to be litigated in court. The OS in other words could stand or fall by the determination of this issue alone.

[35] On this issue I am in agreement with the first defendant that by virtue of case law that will be elaborated in a short while, the plaintiff could not litigate the os as it has not been shown that the plaintiff has obtained a board approval to initiate the same. The purported board resolution produced by the plaintiff has no connection to the subject matter of the present OS. There is no reference for instance that the shareholders had in a board meeting requisitioned the filing of the OS on the matter in issue as it presently stands before the court now. This is not surprising in view of the fact as explained, the approach taken by the second defendant as majority shareholder in not contesting the OS. She chose not to file any affidavit thus signifying no contest against the OS but at the same breath, the second respondent could not very well agree to the filing of the OS as she had been the one instrumental in the recording of the consent judgment together with the first defendant. The second defendant as majority shareholder of the plaintiff knew fully well she could not authorise the plaintiff to continue filing the OS as she had gone to record the consent judgment on terms she alone agreed personally without the involvement of the plaintiff at all in the previous suit. She knew very well that the she had gone on to record the consent judgment but she also now wants the same to be set aside for the benefit of the plaintiff. Her dual roles as a party that personally had recorded the consent judgment and now a party wishing that it be declared a nullity should not escape the scrutiny of this court.

[36] Further, she being the majority shareholder of the plaintiff, only now realised that she might be personally liable if she was to authorise the filing of the OS in a board meeting in view of the provisions of s 132C of the Act as narrated earlier. Hence the absence of her vote in approving the OS to be pursued. The sum effect is that there is no board resolution or any other

authorisations for the plaintiff to pursue the OS.

[37] As indicated, the case law pertaining to this point is the case of *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239; [1990] 3 CLJ Rep 165 where it is said:

> *The lack of authority of the solicitors to act can be challenged at any stage of the proceedings – See Simmons v Liberal Opinion Ltd* [1911] 1 KB 966 followed in *Re LY Swee & Co Ltd* [1968] 2 MLJ 104 at p 107 and in *Chin Kok Kwong Const Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 at 42. *The challenge having been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company. See United Investment & Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 at p 35.
>
> There has been a failure to prove that Soo Seng Chin had the authority to instruct solicitors to institute the suit. *The effect is to make the proceedings a nullity in the sense that the action is not properly constituted*. (Emphasis added.)

[38] Another case in point is the Supreme Court's case of *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555; [1991] 1 CLJ Rep 492 that states:

> Although the various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it.

[39] These cases that are highlighted illustrate the need for the plaintiff as the company to be fully authorised to initiate and continue arguing the OS to its conclusion. There is as explained reason to suggest the plaintiff lacks the sanction requires to maintain the OS. Hence the OS filed and initiated cannot be allowed on this simple ground.

[40] It is also probable that the second defendant could not possibly consent for the plaintiff to file the OS because the previous suit indeed was a matter affecting the properties of the second defendant and not the plaintiff. The elaboration on this is related to the next issue as narrated below.

Whether the previous suit involves the plaintiff

[41] Of importance too should be the issue whether the previous suit where the consent judgment was recorded really had involved the plaintiff in substance.

[42] There is no doubt that the plaintiff was not cited as a party in the previous suit. Nonetheless could the plaintiff still be affected by the substance of the consent judgment for it to have a recourse as requested in the present OS. I shall say that even in substance the plaintiff should not be granted any reliefs in the OS as truly the plaintiff was not involved either in name or in effect of the consent judgment.

[43] This is because the second defendant as the defendant in the previous suit had not indicated that the building structure and the factory belong to the plaintiff. Neither in the pleadings nor in evidence did the second defendant as defendant in the previous suit ever indicate that she was not the owner the same. In fact the previous suit proceeded and culminated by the recording of the consent judgment on the basis that both the building structure and factory belong to the second defendant alone and not the plaintiff. Thus the plaintiff has no concrete or valid reason to set aside the consent judgment late in the day after the recording of the same by parties unrelated to the plaintiff in the true sense of the terms of the consent judgment.

[44] I also do not agree that the first defendant has been made aware that the structure and factory actually belong to the plaintiff in the previous suit. This court is also of the finding the documentary evidence shown has not indicated conclusively the same were the proprietary rights of the plaintiff before the recording of the consent judgment.

Is this court competent to set aside the consent judgment recorded by another court

[45] There is no dispute that the consent judgment was not recorded by this court but by another court of concurrent jurisdiction. I do not think nor agree with the plaintiff that I am at liberty to set aside and declare the same to be a nullity when another court of concurrent jurisdiction has found it fit that such terms as agreed by the first defendant and the second defendant in the previous suit could be incorporated and agreed in the form of the consent judgment recorded.

[46] I seek support for my decision herein based on the Federal Court's case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 where the relevant passage reads:

> *It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction*. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction ...
>
> *It is also long established that one can apply to set aside an order of a superior court only*

in direct proceedings filed for the very purpose of having it set side on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings ...

When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from Hock Hua Bank v Sahari Murid [1981] 1 MLJ 143; [1980] 1 LNS 92 *and as mentioned later in this judgement in connection with a consent judgement.* (Emphasis added.)

[47] I note as submitted by the plaintiff the exception propounded by *Badiaddin* on the setting aside of the consent judgment on the ground that the same contravened statutory provisions and therefore is a nullity or was recorded illegally in contravention of the same. However I do not find the consent judgment contravened the provisions of the Act as submitted by the plaintiff in the present OS as I have explained the previous suit culminating in the recording of the consent judgment did not at all involve the plaintiff both in name and substance. The previous suit was entirely between the first defendant and the second defendant and the consent judgment recorded pertains to the properties of the second defendant personally and not of the plaintiff.

What should have been done by the plaintiff

[48] Quite clearly the only recourse for the plaintiff would have been to challenge the consent judgment and have it set aside by initiating direct proceedings in the previous suit itself in the court that recorded the consent judgment as illustrated by *Badiaddin*. As noted by that case, another court of concurrent jurisdiction as this court now for the OS does not have the jurisdiction to disturb the consent judgment already recorded by another court.

[49] In this regard the plaintiff also cannot challenge or attack the consent judgment in a collateral proceeding as done in this OS. The collateral proceeding separated from the previous suit itself is not allowed. The consent judgment must be challenged in the previous suit itself and in this regard, I have explained I do not agree the consent judgment was entered in contravention of the statutory provisions of the Act. Collateral proceeding is not allowed as illustrated by the case of *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779; [2014] 9 CLJ 1012 where it is decided as follows;

Unless the order is a nullity in the sense as enunciated in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd;* dist ('Badiaddin'), it could not be attacked in collateral proceedings. *The present action was a collateral attack of an order for sale that was regularly obtained and against which the appeal was dismissed. For a collateral*

> *attack to be maintained, the critical particular is not whether there are grounds to impugn the charge but whether the order for sale is a contravention that defies a substantive statutory prohibition. That critical particular was not present in the instant action.* (Emphasis added.)

Is the consent judgment in contravention of s 16(5) of the Act

[50] It is a fundamental argument of the plaintiff that the consent judgment be set aside as a nullity because the same contravened s 16(5) of the Act. Hence the OS would not stand for the plaintiff if it is shown that the consent judgment is not in any way related to the said provision, let alone in contravention of the same.

[51] As I have explained, this court is of the view the previous suit relates to the building structure and factory of the second defendant alone and not the plaintiff. Therefore the plaintiff's submission on the said statutory provision actually has no connection at all with either the previous suit or the consent judgment. Hence it is also not true to say that the said statutory provision has been infringed. It could not been infringed as the terms or contents of the consent judgment are not related to the properties of the plaintiff.

Is the consent judgment contrary to the provision of s 132C of the Act

[52] The agreement in the form of the consent judgment between the first and second defendant in the previous suit could only be in contravention of s 132C of the Act if the building structure and factory are considered to be the properties of the plaintiff. I had already explained these are not the properties of the plaintiff but the second defendant. It was wrong for the plaintiff therefore to say that only the shareholders of the plaintiff in a general meeting can dispose these purported properties of the company. As these properties are not the properties of the plaintiff, there can never be an issue of disposal of the properties of the company in contravention of the said provision of the Act.

[53] The consent judgment also cannot be in contravention of the said provision of the Act even if the building structure and factory are considered and decided to be the properties of the plaintiff. This is simply because there must be a disposal of the properties as required by that provision but the consent judgment does not make reference to a disposal but only to the removal of the same. In this regard the meaning of 'disposal' is well explained in the case of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169 where the Court of Appeal said:

> It is our view however, that Ho Hup's contention that the JDA falls within the purview of s 132C of the Act is misplaced and misconceived, both in fact and in law.

It is necessary to appreciate the context of the term 'disposal' within the ambit of s 132C of Act as is set out below.

... In this regard, statutory interpretation of the word 'disposal' can be seen in the authority of Re: Margart Pty Hamilton v Westpac Banking Corporation & Another [1985] BCLC 314, *where the NSW Supreme Court found that in legal terms, the word 'disposition' when used with reference to property normally connotes a change in the beneficial ownership of an asset by transfer or other type of dealing. Thus, it is clear that it would only be considered a 'disposal' if there was in fact a transfer of or change in beneficial ownership.*

It is interesting to note that Australian Courts have consistently held that the term 'disposition' should be construed as 'transfer' or 'alienate', whereby there must be some change that takes out of the company or transfers beneficial ownership in a corporate asset and passes it to someone else Australian Trade Commission v Film Funding and Management Pty Ltd [87 ALR 49] and *Re: Loteka Limited* [1989] 15 ACLR 620. (Emphasis added.)

[54] Taking note of the above case and comparing the same with the facts in the present OS, it cannot be said there is indeed disposal of the properties of the plaintiff as there is no transfer or change in beneficial ownership or alienation in respect of the building structure and factory to another party.

CONCLUSION

[55] The plaintiff had failed to prove that it is authorised to file and continue litigating the OS. The OS can only be moved before this court if the plaintiff can show that as a company it had the necessary consent by the shareholders to pursue the same.

[56] The OS also cannot be allowed as it is the finding of this court that the building structure and factory were the properties of the second defendant and not the plaintiff. With this finding, the consent judgment is not proven to contravene the relevant provisions of the Act as submitted by the plaintiff.

[57] Even if this court had erred in the finding that the properties belong to the second defendant, there is still no contravention of the relevant provision of the Act as there is no disposal of the properties but only removal of the same as ordered by the consent judgment.

[58] Based on all the reasons stated in this judgment, the OS is dismissed with cost against the plaintiff.

Originating summons dismissed with costs against plaintiff.

Reported by Dzulqarnain Ab Fatar